U.S. DISTRICT CO
NORTHERN DISTRICT
FILED
OCT 21 2004
CLERK, U.S. DISTRICT
By ______ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNA SALINAS, on her behalf and on behalf of those similarly situated,	§	
	§	
Plaintiff,	§	Civil Action No. 3:04-CV-1861-B
	§	
v.	§	
	§	
O'REILLY AUTOMOTIVE, INC.,	§	
	§	
Defendant.	§	

APPENDIX TO DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

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O'Reilly Automotive, Inc. submits this Appendix to its Opposition to Plaintiff's Motion to Strike Affirmative Defenses, which contains the following:

EXHIBITS

Tab	Description	Pages
1	Letter dated 9/22/04 to Plaintiff's Counsel Brady Edwards from Defendant's Counsel Teresa Valderrama	001
2	Letter dated 9/22/04 to Defendant's Counsel Teresa Valderrama from Plaintiff's Counsel Brady Edwards	002 - 003
3	Letter dated 9/28/04 to Plaintiff's Counsel Brady Edwards from Defendant's Counsel Teresa Valderrama	004
4	Plaintiff's Initial Disclosures	005-009

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
O'REILLY AUTOMOTIVE, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent to the following counsel of record this the 20th day of October 2004:

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BY FACSIMILE

Mr. Brady Edwards
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Re: *Anna Salinas v. O'Reilly Automotive, Inc.*, Civil Action No. 3:04-CV-1861-B, In the United States District Court for the Northern District of Texas, Dallas Division

Dear Brady:

Thanks for your letter of last evening.

I am unaware of any authority that prevents a defendant from asserting defenses or affirmative defenses in good faith under Rule 8's notice pleading requirement, and it is my belief that the equitable principles asserted have a place in this litigation. At the least, in an abundance of caution and collegiality, we have provided notice that these principles may be in issue. However, Brady, I find that I often am not as smart as I think I am. Therefore, if you would be kind enough to forward to my attention any authorities you think I should consider, I will review them and get back to you.

Thanks again for your letter, and I look forward to considering whatever additional materials you may have for me to consider.

Very truly yours,

Original Signed By
Teresa S. Valderrama

Teresa S. Valderrama

TSV

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VIA FACSIMILE September 22, 2004

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Re: C.A. No. 3-04CV-1861-B; *Anna Salinas, on her behalf and on behalf of those similarly situated v. O'Reilly Automotive, Inc.*; In the United States District Court for the Northern District of Texas; Dallas Division

Dear Counsel:

Thank you for your letter regarding your affirmative defenses.

With respect to Paragraph 16, the complaint clearly states a claim. If it did not, I would have expected to receive a lengthy 12(b)(6) motion. Similarly, if our complaint did not state a claim, I doubt that your firms would have settled our past cases based on the same form complaint.

With respect to Paragraph 17 and the estoppel component of Paragraph 28, this estoppel defense is legally ineffective. Federal courts have long held that acceptance of an improper wage does not estop an FLSA claim for unpaid overtime. *See Davis v. Food Lion*, 792 F.2d 1274, 1276 (4th Cir. 1986); *Handler v. Thrasher*, 191 F.2d 120, 123 (10th Cir. 1951); *George Lawley & Son Corp. v. South*, 140 F.2d 439, 443 (1st Cir. 1944); *Marshall v. R & M Erectors*, 429 F. Supp. 771, 780 (D. Del. 1997). It is also well established that an employee's failure to demand payment of overtime wages does not estop that employee's FLSA recovery. *South*, 140 F.2d at 442; *Bailey v. Karolyna Co.*, 50 F. Supp. 142, 143 (S.D.N.Y. 1943).

With respect to the unclean hands component of Paragraph 28, the doctrine of unclean hands is an equitable defense applicable only to equitable claims. *See, e.g., Curley v. Brigholi Curley & Roberts Assocs.*, 746 F. Supp. 1208, 1219 (S.D.N.Y. 1989); *Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 165 (Tex.App.-Hous. [14 Dist.], 1991). Unclean hands is not a defense to claims for money damages or violations of statutory rights. *Id.* Because our clients' FLSA claim is for money damages arising from a statutory violation, the defense of unclean hands simply has no application.

With respect to the laches component of Paragraph 26 and all of Paragraph 27, laches is an equitable defense which applies when there is no statute of limitations. *Wagner v. Baird*, 48 U.S. 234, 240-1 (1849). Where a statute of limitations is provided, the statute of limitations is definitive. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). Thus, the doctrine of laches is inapplicable when Congress has provided a statute of limitations to govern an action. *See, e.g., Miller v. Maxwell's Int'l*, 991 F. 2d 583, 586 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975).

As you know, Congress has provided a statute of limitations to govern FLSA actions. *See* 29 U.S.C. § 255. Accordingly, O'Reilly's laches defense is insufficient as a matter of law. *Miller*, 991 F. 2d 586; *cf. Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342 (5th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) (declining to apply laches to FLSA claim).

With respect to the waiver component of Paragraph 28, as you know, employees are unable to terminate their FLSA rights except by way of a court-approved or DOL-facilitated settlement. Accordingly, I do not see how waiver could be an appropriate defense.

I look forward to hearing from you regarding your decision as to what to do with these defenses.

Sincerely,

Brady Edwards

cc: Derek Braziel
Rex Burch

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BY FACSIMILE

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Re: *Anna Salinas v. O'Reilly Automotive, Inc.*, Civ. Act. No. 3:04-CV-1861-B, In the United States District Court for the Northern District of Texas, Dallas Division

Dear Brady:

I received your telephone message yesterday regarding a possible motion to strike various defenses or affirmative defenses pleaded by O'Reilly in this matter.

As noted in my September 22 correspondence, O'Reilly has pleaded equitable principles and other defenses that occasionally factor into FLSA wage claims and collective actions. Given a broadly-defined putative collective action class and nonspecific allegations of working "off-the-clock," as occurs here, this is appropriate.

I reviewed the case cites you forwarded. They include no Fifth Circuit authority compelling peremptory dismissal of O'Reilly's defenses or affirmative defenses. On the contrary, courts rendered those decisions on fully-developed records. Certainly, in such circumstances, a court and the parties will have sifted through the claims and evidence and will have considered and refined their arguments favoring and opposing the application of the equitable principles pleaded. It also is possible that certain defenses or affirmative defenses may never ripen into contention. For this reason, Brady, I think it premature at this juncture to withdraw any of O'Reilly's defensive pleadings.

You indicated you will be out of the office today and tomorrow. I will be in the office today, for the most part, and can be reached most of tomorrow morning at the office.

Very truly yours,

Teresa S. Valderrama

TSV

cc: Rex Burch

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNA SALINAS, on her behalf and on behalf of those similarly situated,	§ §	
	§	**Civil Action No.3:04-CV-1861-B**
v.	§ §	
O'REILLY AUTOMOTIVE, INC.	§	**Jury Demanded**

INITIAL DISCLOSURES

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, Plaintiffs file their Initial Disclosures.

A. Individuals with Discoverable Information

Anna Salinas
c/o EDWARDS & GEORGE, LLP
1000 Louisiana, Suite 1300
Houston, Texas 77002
(713) 339-3233
(713) 339-2233 [fax]

Ms. Salinas is a plaintiff in this lawsuit and has discoverable information regarding the claims that she has alleged against the defendants and the damages that she seeks by way of this lawsuit. Ms. Salinas also has information regarding the identities of potential plaintiffs who may be eligible to join this lawsuit.

Pat Gruesbeck
c/o EDWARDS & GEORGE, LLP
1000 Louisiana, Suite 1300
Houston, Texas 77002
(713) 339-3233
(713) 339-2233 [fax]

Ms. Gruesbeck is a plaintiff in this lawsuit and has discoverable information regarding the claims that she has alleged against the defendants and the damages that she seeks by way of this lawsuit. Ms. Gruesbeck also has information regarding the identities of potential plaintiffs who may be eligible to join this lawsuit.

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c/o Teresa S. Valderrama
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O'Reilly Automotive, Inc. is a defendant in this lawsuit and has information regarding the claims and defenses asserted in this lawsuit.

David O'Reilly
c/o c/o Teresa S. Valderrama
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David O'Reilly is the CEO of O'Reilly Automotive. Based upon his media statement, he has personal knowledge regarding the claims and defenses asserted in this lawsuit.

David George
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These lawyers may testify regarding Plaintiffs' attorney's fees and therefore have discoverable information regarding reasonable and necessary attorney's fees associated with this type of litigation.

B. Relevant Documents

Plaintiffs may have a small collection of documents related to this case. If Plaintiffs locate responsive documents, copies of the collection will be produced to counsel for Defendants under separate cover. Plaintiffs will supplement should they discover that they possess any additional documents relevant to this lawsuit.

C. Damages

Plaintiffs have yet to perform a detailed calculation of their damages. Plaintiffs will perform such a calculation and will supplement this response at that time. Plaintiffs seek recovery of the unpaid overtime wages, liquidated damages, and mandatory attorneys' fees as provided by the Fair Labor Standards Act. Please note, however, that any estimates will not include attorneys' fees, which continue to mount in this case.

D. Insurance

Not applicable.

Plaintiff reserves the right to amend, revise, and/or supplement these disclosures in accordance with the Federal Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served in accordance with the Federal Rules of Civil Procedure on September 22, 2004 as follows:

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